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CLERK US DISTRICT COURT	
DISTRICT OF NEVADA	
BY:	DEPUTY

1 Jesse Aron Ross  
 2 HDSR-P.O. Box 650  
 3 Indian Springs NV.  
 4 89070 #1095756

5  
 6 UNITED STATES DISTRICT COURT  
 7 DISTRICT OF NEVADA

Jesse Aron Ross, Plaintiff,	CASE NO: 2:17-cv-02386-APG-GWF
VS - Brian Sanderson et al., Defendants	* Oral Argument Requested * MOTION In Limine to waive NRS 41A-071 requirement and permission to present certain claims, in relation to the evolving Standards of decency Doctrine.

17  
 18  
 19 Comes now above named Plaintiff, appearing pro se, and  
 20 incarcerated, to respectfully move this court to waive NRS 41A-071  
 21 requirement and permit Plaintiff to present certain claims, in relation  
 22 to the evolving standards of decency doctrine. This motion is  
 23 based upon the papers and pleadings on file, the attached memo  
 24 of points and authorities, and any oral argument permitted at  
 25 the hearing of this matter. The defendants HAVE BEEN  
 26 served, see certificate of service.

27 Memorandum of Points & Authorities

1        I. Procedural History - Abbreviations

2        (i) On 09-25-17, Plaintiff submitted the operable  
3        civil complaint in this case. First Amended complaint.

4        (ii) Abbreviations

(A) NEVADA Department of Corrections	"NDOC"
(B) High Desert State Prison	"HDSP"
(C) medical delivery system	"MDS"
(E) First Amended Complaint	"FAC"
(F) INFORMA PLAUPERIS	"IFP"

11        II. ISSUES

- 12        (i) NRS 41A.071 Requires any civil complaint filed  
13        against a medical practitioner be accompanied with  
14        an Affidavit of malpractice from a physician who practices  
15        a similar form of medicine as the practitioner being  
16        sued, if the action sounds in professional malpractice.
- 17        (ii) NRS 41A.100 Allows for certain exceptions to  
18        the Affidavit requirement for cases of res ipsa  
19        loquitur, none of which apply here.
- 20        (iii) Any suit filed without the NRS 41A.071 Affidavit is  
21        void ab initio.
- 22        (iv) In Plaintiff's "FAC" there are three allegations  
23        of medical malpractice, see "FAC" counts 2, 4, and

- Count 18, which Do Not have the required Affidavit.
- (V) Plaintiff is A Pro-se - incarcerated indigent Litigant, unable to obtain the required Affidavit due to incarceration and indigency.
- (VI) Generally Speaking verbal Harassment does not violate the 8<sup>th</sup> Amendment proscription on cruel and unusual punishment.

vii)

### III Rule

NRS 41A.071; NRS 41A.600

Bounds-v-Smith 430 U.S. 817 97 S.Ct. 1491 (1977)

Lewis-v-Casey 518 U.S. 343 116 S.Ct. 2174 (1996)

Estelle-v-Gamble 429 U.S. 97 97 S.Ct. 285 (1976)

Foster-v-Rannels 554 F.3d 807 9<sup>th</sup> Cir. 2009

Whitley-v-Albers 475 U.S. 312 106 S.Ct 1078 (1986)

Hernandez-v-Denton 861 F.2d 1421 9<sup>th</sup> Cir 1988

Austin-v-Terhune 367 F.3d 1167 9<sup>th</sup> Cir 2004

Wood-v-BeAuclair 692 F.3d 1041 9<sup>th</sup> Cir 2012

Oltarzewski-v-Ruggiero 830 F.2d 136 9<sup>th</sup> Cir (1987)

### IV. Analysis.

#### A. NRS 41A.071 Affidavit

NRS 41A.071 requires All civil Actions, Against a medical provider, For malpractice, be Filed with an Affidavit from a medical provider stating the Alleged Torts, Amount to Professional malpractice. Any Action Filed without the Statutorily required Affidavit is void Ab initio.

1 Plaintiff is Pro-Se - incarcerated and indigent, as  
 2 evidenced by Plaintiff "FAC" and "IFP" on file.  
 3 Therefore NRS 41A.071 is unconstitutional as  
 4 it applies to this case and this Plaintiff.  
 5 NRS 41A.071 is voidable, absent the state  
 6 making an alternative means for Plaintiff to access the courts.  
 7 Plaintiff has a constitutionally guaranteed right to access  
 8 the courts (see Lewis v. Casey 518 U.S. 343 at 346 116  
 9 S.Ct 2174 (1996) Furthermore the state not only has a  
 10 duty to abstain from tortious interference to the courts,  
 11 that is the prisoners right to access. But the supreme court  
 12 requires the state of nevada to affirmatively take steps,  
 13 to assure prisoners have meaningful access to the courts  
 14 see Bounds v. Smith 430 U.S. 817 at 824 <sup>97</sup> 116 S.Ct 1491  
 15 (1977). The right to meaningful access does not exist in  
 16 "Abstract Free Standing Form" Lewis 518 U.S. at 351. The right  
 17 is ancillary to an underlying claim without which Plaintiff  
 18 cannot have suffered injury by being shut out of court.  
 19 To put it differently no harm no foul. The requirement  
 20 that a Plaintiff have suffered an actual injury is  
 21 jurisdictional and cannot be waived. (Lewis 518 U.S. at  
 22 349). In Bounds the court held that "Prison inmate  
 23 has a constitutional right of access to the courts to  
 24 assert such procedural and substantive rights as may  
 25 be available to him under state and federal law (See  
 26 Bounds 430 U.S. at 833). In the case at bar, Plaintiff  
 27 is blocked from redress by an arbitrary

1 State Statute. (NRS 41A.071). No Doubt this Statute  
 2 is in effect to Curb Vexations and meritless  
 3 Litigation. Certainly important. However, Should this  
 4 Court Allow Plaintiff to Proceede with the requisite  
 5 Affidavit, The STATES Goals are still Achieved,  
 6 By the Applicable PLRA, which requires the Judge,  
 7 an expert in the Law, to dismiss ~~meritless~~  
 8 vexations and meritless cases. See 28 USC §  
 9 1915(A). To Allow A tortfeasor immunity from Suit  
 10 due to his victim's inability to pay A medical Provider  
 11 for An Affidavit is Not Fair. Pro-se - incarcerated - IFP  
 12 Litigants Are NOT on the same grounds as Free world  
 13 Litigants. They dont have access to the money needed  
 14 to obtain the Affidavits. Actually Plaintiff need not  
 15 Explicate the Disperities Between A incarcerated VS -  
 16 Free world Litigant, As the the Court is surely cognizant.  
 17 Judicial restraint and caution is Absolutely necessary  
 18 When it comes to voiding A State Statute, when a Statute  
 19 is so clearly unconstitutional it is the within the Courts  
 20 discretion to name the offending Statute voidable.  
 21 One of the only sources for accountability is the  
 22 Civil Justice system. If there is no Accountability  
 23 Then no one is safe. Any unnecessary limits on  
 24 Access to Accountability through the courts leaves  
 25 Every American at Risk.

Finally Plaintiff has shown an underlying claim, Namely A well Pled Prima Facie medical malpractice Claim(s), Plaintiff has shown an unconstitutional bar to access the court, and the injury sustained is the dismissal of meritorious claims, which ought to be Adjudicated upon there merits in accord with the 7<sup>th</sup> Amendment to the U.S. Constitution.

## B. COUNT 1&3 "FAC" As it Applies to evolving Standards OF Decency Doctrine.

In Count 1&3 of Plaintiffs "Fac" Plaintiff Alleges "Sexual Harassment; Verbal abuse, Psychological abuse, A Violation of the 8<sup>th</sup> Amendment to the U.S. Constitution. (See Plaintiff "Fac" on file, Page 6-N.).

The Constitution is not a ~~static~~ State document. The Constitution evolves through Judicial interpretation as our Society evolves. (Compare Plessy-v-Ferguson 163 U.S 537 [1896] to Brown-v-Board of Education of Topeka 347 U.S. 483 [1954]; Scott-v-Sundford 60 U.S. 393 [1857] to the 13<sup>th</sup> & 14<sup>th</sup> Amend; more recently Austin-v-Terhune 367 F.3d 1167 9<sup>th</sup> Cir. 2004 to Wood-v-Beauclair 692 F.3d 1041 9<sup>th</sup> Cir 2012).

In Fact the Supreme Court of the United States APTLY observed over 40 years Ago:

"The eighth Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency -- Thus we have held repugnant to the

1 to the eighth amendment Punishments which are  
 2 incompatible with the evolving standards of decency  
 3 that mark the progress of a maturing Society." (estelle-v-  
 4 Gamble 429 U.S. 97 at 259 97 S.Ct. 285 [1976]).

5 In ~~Sexual Harassment~~ Olarczewska-v-Ruggiero  
 6 930 F.2d 136, 139 9<sup>th</sup> Cir(1987), it was held that  
 7 Verbal harassment is not sufficient to state a claim).

8 And in 2004 sexual harassment was held Not  
 9 Actionable unde A § 1983 Claim. But the 9<sup>th</sup> Cir. in  
 10 2012 found that standards of Decency had evolved, that  
 11 Sexual harassment in fact violated the 8<sup>th</sup> Amendment's  
 12 proscription on cruel and unusual punishment, primarily  
 13 because there is no conceivable legitimate penological  
 14 interest served in sexually harassing prisoners. Now  
 15 30 years after Olarczewska, Plaintiff contends that  
 16 evolving standards of decency now prohibit the  
 17 unnecessary verbal and psychological abuse of prisoners,  
 18 As the combination are toxic to the human spirit. There is  
 19 no legitimate penological interest served. In fact the  
 20 "NDoc" recognizes this in Administrative regulation 3.39  
 21 which specifically prohibits sexual and verbal abuse.

22 In Howard-v-Cannett case No: 2:11-cv-01402-APG-  
 23 GWF 2014 U.S. Dist Lexis 19231 115<sup>th</sup> honor stated "The  
 24 eighth Amendment Prohibits officials from inflicting cruel and  
 25 unusual punishment upon prison inmates; The key inquiry is not  
 26 the nature of the inmates injury, But the reason for inflicting  
 27 that injury. The courts deference to Prison

1 Administrators ---- does not insulate from  
 2 review Actions taken in Bad Faith" pg 14.  
 3 There of course will be times where aggressive  
 4 Verbal Commands are necessary to restore order, or  
 5 for prophylactic purposes, But those are not the  
 6 instances Plaintiff has filed suit over. Instead  
 7 Plaintiff has provided DATE, times and locations where  
 8 Sexually derisive comments have been made, threats,  
 9 Attempts by Senior officers to escalate situations into  
 10 Combust, and the ongoing systematic Psychological  
 11 Abuse of Plaintiff, which is a combination of Verbal  
 12 and Physical Micro-aggressions directed at Plaintiff  
 13 exacerbating his Anxiety disorder/Attacks and  
 14 Night terrors. There is a fundamental Principal in  
 15 our society, Law enforcement officers are held to  
 16 a higher ethical standard than the Average citizen. If a  
 17 Prisoner at "HDSB" were to sexually harass, verbally or  
 18 Psychologically Abuse an officer, the following would ensue;  
 19 First the offending Prisoner would be beat to a pulp, then  
 20 his personal property would be destroyed, then he would  
 21 be put in solitary with A write, Plaintiff has seen  
 22 Just that. So Prisoners are held to a higher ethical  
 23 Standard than the police officers. Prisoners do not  
 24 get a lot of sympathy from Society, but it is not  
 25 Sympathy Plaintiff is asking for it is humanity,  
 26 decency that mark a mature Society. The  
 27 Verbal and Psychological abuse, are precursors to

1 Physical and sexual Abuse. And; at Least as  
 2 it pertains to this case there is no legitimate Penological  
 3 purpose served. In fact it is counter-productive to  
 4 the public interest. The "NDOC" is creating mean and  
 5 angry people and then releasing them on the community.  
 6 Drug Addicts, Property offenders (who enter "NDOC") who  
 7 have no violent history are subject to ongoing abuse  
 8 by these officers. Not only does this prevent the rehabilitation  
 9 of errant behavior, it encourages and promotes a  
 10 hostile living environment and violence. Just recently  
 11 officers shot and killed (and maimed another prisoner)  
 12 a prisoner in full restraints. Therefore Plaintiff has  
 13 Standing because this behavior presents an imminent  
 14 (not hypothetical or conjectural) threat to Plaintiff physical  
 15 safety. Eventually a officer is going to go to  
 16 far and Plaintiff's very life may be in peril. The  
 17 key inquiry is (as this court suggested in Howard)  
 18 "the reason for inflicting that injury", what is the  
 19 reason for the systemic verbal/psychological abuse?  
 20 Plaintiff puts forth that it is sadistic and malicious.  
 21 Plaintiff is not asking for an adjudication of the merits,  
 22 just that this Court allow Count 18 to survive  
 23 Screening, so Plaintiff can flesh out during the  
 24 discovery process the extent of the problem, so  
 25 Plaintiff can present evidence that the conduct  
 26 complained of, is no longer the price prisoners pay as  
 27 a part of their incarceration

1 Prisoners are sent to prison As a punishment  
2 NOT to be punished and tortured. (and to  
3 rehabilitate, deter crime, and protect society of course).

## 4 5 V. Conclusion

6 Therefore, Plaintiff respectfully requests the court Allow  
7 Plaintiff "FAC" counts 2, 4, 13, 18 survive the 28 USC  
8 Section 1915(A) screening. The Defendants can always file  
9 a demurrer/ Plea in abatement/ Rule (FRCP) 56 motion. Plaintiff  
10 has served the defendants a copy of this motion even  
11 though they have not yet been served, Just to be fair.

12 Respectfully,

13 Jesse Ross

14 I Jesse Ross declare under penalty of perjury, the foregoing  
15 is true and correct to the best of my personal knowledge  
16 per 28 USC § 1746 NRS 53.045

17 09-29-17

Jesse Ross

18 Signed At Clark County N.V.

Jesse Ross

19 I served a true and correct copy to the defendants through  
20 Intra-departmental mail at "HSP" Addressed to the  
21 Defendants, By depositing A copy in the institutional mail  
22 reception in Unit 11-e-a on 09-30-17.  
23

24 Signed on 9-30-17

Jesse Ross

25 at Clark County N.V.

Jesse Ross #1095756

26 HSP P.O.Box 650

27 Indian Springs NV 89070

ROSS  
Ross  
Hart#10457SG  
PO Box 650  
Indian Springs  
NV 89410

Ross-v-Sindona et al.,  
Case No. 2:17-cv-02386-APG-GWF

Clerk  
USOC - D.Nev

Lloyd D. George U.S. Courthouse  
333 Las Vegas Blvd S. - Rm 1334  
Las Vegas, NV 89101

